A

**PP**

**v.**

**DATO' SERI ANWAR IBRAHIM & ANOTHER APPEAL**

B

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
[CRIMINAL APPEALS NOS: W-09-71-2009 & W-09-74-2009]

C

21 DECEMBER 2009

***CRIMINAL PROCEDURE:*** *Appeal - Right of - Decision of High Court on a s. 51 Criminal Procedure Code application - Whether such decision finally disposing of rights of parties - Whether such decision*

D

*appealable - Criminal Procedure Code, s. 51 - Courts of Judicature Act 1964, ss. 3, 50(1)*

***CRIMINAL PROCEDURE:*** *Disclosure of information - Discovery of documents and other things - Whether application for discovery of documents and other things ought to be made after commencement of trial, generally - Whether discretionary power of court in such an application limited - Whether application for discovery under s. 51A of the Criminal Procedure Code limited to those documents mentioned under s. 51A - Whether ss. 51 and 51A of Criminal Procedure Code separate and distinct provisions - Criminal Procedure Code, ss. 51, 51A*

E

F

***CRIMINAL PROCEDURE:*** *Disclosure of information - Discovery of documents and other things - Section 51A of Criminal Procedure Code - Scope and extent of - Whether s. 51A of Criminal Procedure Code separate and distinct from s. 51 - Criminal Procedure Code, ss. 51, 51A*

G

***CRIMINAL PROCEDURE:*** *Disclosure of information - Discovery of documents and other things - Whether lacuna in Malaysian law relating to criminal discovery and inspection - Whether necessary for courts to invoke s. 5 of Criminal Procedure Code and apply English law - Criminal*

H

*Procedure Code, s. 51*

***CRIMINAL PROCEDURE:*** *Disclosure of information - Discovery of documents and other things - Witness statements and/or police statements - Whether a general demand for witness statements ought not to be entertained - Whether undesirable for prosecution to supply defence with*

I

*witness statements and/or police statements as a matter of public policy*

The respondent was first charged in the Sessions Court with an offence under s. 377B of the Penal Code. His case was then transferred to the High Court by the Public Prosecutor ('the appellant') under s. 418A of the CPC. In the High Court, the respondent filed an application under s. 51A of the CPC, for an order to compel the appellant to produce various documents, materials and items. The respondent contended that the documents and materials requested were important and imperative for the preparation of his defence. The High Court allowed most parts of the respondent's application, save for the discovery and/or production of: (i) certain CCTV recordings - the High Court Judge had allowed the production of part of the CCTV recordings but the respondent applied for all such recordings; (ii) original DNA samples; (iii) statements of unnamed witnesses under s. 112 of the CPC. The PP appealed against the orders made, whereas the respondent cross-appealed. At the hearing of the appeal, counsel for the respondent raised a preliminary objection. Counsel contended that the appeal was incompetent on the ground that the High Court's Order was not appealable. Counsel claimed that the Order was not a "decision" within the meaning of s. 50(1) read with s. 3 of the Courts of Judicature Act 1964.

**Held (allowing PP's appeal in part, and dismissing the respondent's preliminary objection and cross-appeal)**
**Per Hasan Lah JCA (delivering the judgment of the court):**

**(1)** The High Court's order had finally disposed of the issue of the production of the documents and materials by the PP pursuant to s. 51 of the CPC in that the PP was ordered to supply the documents or materials to the respondent. The decision of the High Court had also finally disposed of the respondent's application (Notice of Motion). This was the correct time for the PP to appeal against the High Court's decision. *PP v. Raymond Chia Kim Chwee & Anor* (foll); *PP v. Letchumanan Suppiah* (foll). (paras 14 & 15)

**(2)** The High Court judge did not rely on s. 5 of the CPC nor resort to English law in making his Order. As such it had to be assumed that the judge had rejected the respondent's contention that s. 5 was applicable. Indeed, in the instant case, s. 5 of the CPC was not applicable to the respondent's application. There is no lacuna in the CPC touching on the criminal discovery and inspection process thereby making it necessary for the courts to resort to English law. *PP v. Raymond Chia Kim Chwee & Anor* (foll). (paras 24, 25, 26 & 27)

**(3)** Except in the case of documents referred to in the charge, an application under s. 51 of the CPC should be made only after the commencement of the trial. The exercise of the court's discretionary power under s. 51 of the CPC at the pre-trial stage has been limited, and the section construed strictly. In the instant case, except for what was provided under s. 51A of the CPC, the respondent was not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial. Thus, the respondent was not entitled to get the order prayed for. Section 51A is very clear as to what the prosecution is required to supply. *PP v. Raymond Chia Kim Chwee & Anor (foll)*; *Kulwant v. PP* (foll). (paras 33, 40, 41 & 42)

**(4)** The High Court had erred in disregarding past authorities of the apex court on the interpretation of s. 51 of the CPC. The past decisions of the apex court were still relevant and applicable in respect of an application for documents not specifically mentioned in s. 51A of the CPC. The law on the application of s. 51 CPC has not changed notwithstanding the introduction of s. 51A into the CPC. The court could not read parliament's purpose of introducing s. 51A into s. 51. Neither could the court indirectly rely on the reasons for the inclusion of s. 51A to interpret s. 51. Section 51 and 51A are two separate and distinct provisions. *PP v. Raymond Chia Kim Chwee & Anor* (foll); *Husdi v. PP* (foll); *Retnarasa Annarasa v. PP (*ovrl). (paras 43, 44, 45, 46, 47, 48 & 49)

**(5)** The High Court's decision in ordering the supply of part of the CCTV recordings to the respondent was outside the scope of s. 51 of the CPC. The object of the respondent's application for the CCTV recordings was merely to fish for information. The respondent was therefore not entitled to obtain the original CCTV recordings before the commencement of trial. The order of the High Court judge in allowing the respondent's application in respect of the original CCTV recordings ought to be set aside and the cross-appeal by the respondent dismissed. (paras 51, 52, 53 & 54)

**(6)** The High Court judge's order in refusing to allow the respondent's application for the production or inspection of the original DNA samples and swabs was correct. The respondent was not entitled at the pre-trial stage to have the original samples and swabs. However, the judge erred in allowing the

respondent's counsel to inspect the slides prepared during testing and to obtain pictures of those slides. The respondent ought not to be allowed to fish for information. Further, s. 51A only referred to documents. Thus, the order by the judge in respect of the slides and pictures ought to be set aside and the decision on the DNA samples and swabs affirmed. The cross-appeal by the respondent on the issue should be dismissed. (paras 55, 56, 57, 58, 59 & 60)

**(7)** The judge erred in ordering the case notes or worksheets of the chemist prepared during analyses of the DNA samples, to be supplied to the respondent. The worksheets did not fall under s. 51A(1)(b) of the CPC as the prosecution would not be tendering them in court as evidence. Further, the application for the production of those documents could only be made after the commencement of the trial. Thus the order of the judge on this issue ought to be set aside. (para 62)

**(8)** The judge erred in respect of his order for the production of the witness statements. He had no jurisdiction to make such an order under s. 51 of the Code before the commencement of the trial. Furthermore the statement made to the police in the course of a police investigation is a privileged document. As a matter of public policy it was undesirable for the prosecution to supply the defence with the police statements as these was a real danger of tampering with witnesses. In any event, the defence was merely fishing for information. A general demand for the witnesses' statements should not be entertained. The Judge had similarly erred in ordering the production of other documents to the respondent, without prejudice to the respondent's right to be supplied with the documents under s. 51A(1)(b) of the CPC. *PP v. Raymond Chia Kim Chwee & Anor* (foll); *Husdi v. PP* (foll). (paras 65, 66, 68, 69, 70, 71 & 72)

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden dituduh di Mahkamah Sesyen dengan kesalahan di bawah s. 377B Kanun Keseksaan. Kesnya pula dipindahkan ke Mahkamah Tinggi oleh pendakwa raya ("perayu") di bawah s. 418A Kanun Tatacara Jenayah. Di dalam Mahkamah Tinggi, responden memfailkan permohonan di bawah s. 51A Kanun Tatacara Jenayah, untuk perintah memaksa perayu mengemukakan berbagai dokumen, bahan-bahan dan beberapa item. Responden

berhujah bahawa dokumen-dokumen dan bahan-bahan yang diminta adalah penting dan wajib dalam menyediakan pembelaannya. Mahkamah Tinggi membenarkan beberapa bahagian dalam permohonannya, kecuali penzahiran dan/atau pengemukaan (i) rakaman CCTV yang tertentu - Mahkamah Tinggi telah membenarkan sebahagian dari rakaman CCTV dikemukakan tetapi responden telah memohon untuk semua rakaman-rakaman; (ii) sampel DNA yang original; (iii) penyataan saksi-saksi yang tidak diberi nama di bawah s. 112 Kanun Tatacara Jenayah. Pihak pendakwaraya membuat rayuan terhadap perintah-perintah yang dibuat, dan responden membuat rayuan balas. Di perbicaraan rayuan, peguam responden membangkitkan bantahan awalan. Peguam berhujah bahawa rayuan adalah tidak kompeten atas alasan bahawa perintah Mahkamah Tinggi tidak boleh dirayui. Peguam mendakwa bahawa perintah bukan 'keputusan' di dalam maksud s. 50(1) dibaca dengan s. 3 Akta Mahkamah Kehakiman 1964.

**Diputuskan (membenarkan rayuan pendakwaraya sebahagiannya, dan menolak bantahan awalan dan rayuan balas responden)**
**Oleh Hasan Lah HMR (menyampaikan penghakiman mahkamah):**

**(1)** Perintah Mahkamah Tinggi telah menyelesaikan isu pengemukaan dokumen-dokumen dan bahan-bahan oleh pihak pendakwaraya di bawah s. 51 Kanun Tatacara Jenayah di mana pihak pendakwaraya diperintahkan untuk memberi dokumen-dokumen atau bahan-bahan kepada responden. Keputusan Mahkamah Tinggi juga telah menyelesaikan permohonan responden (notis usul). Ini adalah masa yang sesuai untuk pihak pendakwaraya untuk merayu terhadap keputusan Mahkamah Tinggi. *PP v. Raymond Chia Lim Chwee & Anor* (diikuti); *PP v. Letchumanan Suppiah* (diikuti).

**(2)** Hakim Mahkamah Tinggi tidak bergantung kepada s. 5 Kanun Tatacara Jenayah atau menggunakan undang-undang English dalam membuat perintahnya. Oleh itu, ia boleh dianggapkan bahawa Hakim telah menolak hujahan responden bahawa s. 5 boleh digunapakai. Sebenarnya, di dalam kes ini, s. 5 Kanun Tatacara Jenayah tidak digunapakai di dalam permohonan responden. Tidak terdapat lakuna di dalam Kanun Tatacara Jenayah yang menyentuh penemuan jenayah dan proses pemeriksaan sekaligus menjadikannya wajib untuk mahkamah menggunakan undang-undang English. *PP v. Raymond Chia Kim Chwee & Anor* (diikuti).

**(3)** Melainkan kes di mana dokumen-dokumen dirujuk di dalam pertuduhan, permohonan di bawah s. 51 KTJ hanya patut dibuat selepas permulaan perbicaraan. Pelaksanaan kuasa budi bicara mahkamah di bawah s. 51 KTJ di tahap pra-perbicaraan diberi batasan, dan seksyen ditafsirkan dengan ketat. Di dalam kes ini, melainkan apa yang diberi di bawah s. 51A KTJ, responden tidak mempunyai hak untuk membuat penzahiran atau memeriksa keterangan atau bahan yang di bawah milikan pihak pendakwaraya sebelum permulaan perbicaraan. Oleh itu, responden tidak berhak untuk mendapatkan perintah yang dipohon. Seksyen 51A adalah jelas mengenai apa yang wajib diberikan oleh pihak pendakwaraya. *PP v. Raymond Chia Kim Chwee & Anor* (diikuti); *Kulwant v. PP* (diikuti).

**(4)** Mahkamah Tinggi membuat kesalahan apabila tidak mengendahkan keputusan-keputusan lepas mahkamah tertinggi negara mengenai tafsiran s. 51 KTJ. Keputusan-keputusan mahkamah tertinggi negara yang lepas masih relevan dan digunapakai di dalam permohonan untuk dokumen-dokumen yang tidak disebut secara spesifik di dalam s. 51A KTJ. Undang-undang atas permohonan s. 51 KTJ tidak berubah walaupun dengan perkenalan s. 51A ke dalam KTJ. Mahkamah tidak boleh membaca tujuan parlimen dalam memperkenalkan s. 51A ke dalam s. 51. Mahkamah juga tidak boleh bergantung kepada alasan-alasan kemasukan s. 51A untuk mentafsir s. 51. Seksyen 51 dan 51A adalah dua peruntukan yang asing dan berbeza. *PP v. Raymond Chia Kim Chwer & Anor* (diikuti); *Husdi v. PP* (diikuti), *Retnasara Annarasa v. PP* (ditolak).

**(5)** Keputusan Mahkamah Tinggi dalam membuat perintah supaya sebahagian dari rakaman CCTV diberi kepada responden adalah di luar skop s. 51 KTJ. Tujuan permohonan responden untuk rakaman CCTV hanya untuk memancing maklumat. Responden tidak mempunyai hak untuk memperolehi rakaman-rakaman CCTV yang original sebelum permulaan perbicaraan. Perintah hakim Mahkamah Tinggi dalam membenarkan permohonan responden mengenai rakaman-rakaman CCTV yang original mesti diketepikan dan balas rayuan responden ditolak.

**(6)** Perintah hakim Mahkamah Tinggi yang tidak membenarkan permohonan responden untuk pengemukaan atau pemeriksaan sampel-sampel DNA yang original dan swab adalah tidak salah. Responden tidak mempunyai hak pada peringkat pra-perbicaraan untuk memperolehi sampel-sampel original dan swab. Tetapi,

hakim salah apabila membenarkan peguam responden memeriksa slides yang disediakan semasa ujian dan memperolehi gambar-gambar slides tersebut. Responden tidak sepatutnya dibenarkan untuk memancing maklumat. Seterusnya, s. 51A hanya merujuk kepada dokumen-dokumen. Oleh itu, perintah oleh Hakim mengenai slides dan gambar-gambar mestilah diketepikan dan keputusan mengenai sampel DNA dan swabs disahkan. Rayuan balas oleh responden mengenai isu ini sepatutnya ditolak.

**(7)** Hakim membuat kesalahan apabila memerintahkan nota kes atau kertas kerja ahli kimia yang disediakan semasa analisa-analisa sampel DNA , diberikan kepada responden. Kertas kerja tersebut tidak jatuh di bawah s. 51A(1)(b) KTJ kerana pihak pendakwaan tidak akan mengemukakannya di mahkamah sebagai keterangan. Juga, permohonan pengemukaan dokumen-dokumen tersebut hanya boleh dibuat selepas permulaan perbicaraan. Oleh itu, perintah hakim mengenai isu ini diketepikan.

**(8)** Hakim telah membuat kesalahan apabila membuat perintah untuk pengemukaan penyata-penyata saksi-saksi. Beliau tidak mempunyai bidangkuasa untuk membuat perintah tersebut di bawah s. 51 KTJ sebelum permulaan perbicaraan. Seterusnya, penyataan yang dibuat ke pihak polis sewaktu siasatan polis dijalankan adalah dokumen terlindung. Sebagai satu polisi awam, ia tidak wajar untuk pihak pendakwaan memberi pihak pembelaan penyataan-penyataan polis kerana ini boleh mengakibatkan saksi-saksi diusik. Walau apapun, pihak pembelaan hanya memancing untuk maklumat. Permohonan umum untuk penyataan-penyataan saksi tidak harus dilayan. Hakim juga membuat kesalahan dalam membuat perintah pengemukaan dokumen-dokumen yang lain kepada responden, tanpa prejudis kepada hak responden untuk diberi dokumen-dokumen di bawah s. 51A(1)(b) KTJ. *PP v. Raymond Chia Kim Chwee & Anor* (diikuti); *Husdi v. PP* (diikuti).

**Case(s) referred to:**

*Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA* ***(refd)***
*Hj Abdul Ghani Ishak v. PP [1979] 1 LNS 23 HC* ***(refd)***
*Husdi v. PP [1979] 1 LNS 33* ***(refd)***
*Husdi v. PP [1980] 1 LNS 29 FC* ***(foll)***
*Kulwant v. PP [1986] 2 MLJ 10* ***(refd)***
*PP v. Letchumanan Suppiah [2009] 5 CLJ 652 FC* ***(foll)***
*PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC* ***(foll)***
*PP v. Teoh Choon Teck [1962] 1 LNS 141 HC* ***(refd)***

*Retnarasa Annarasa v. PP [2008] 4 CLJ 90 HC* ***(ovrd)***
*Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA* ***(refd)***
*State of Orissa v. Debendra Nath Padhi [2004] 4 LRI 860* ***(refd)***
*Syed Abu Bakar Ahmad v. PP [1981] 1 LNS 127 HC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, ss. 3, 50(1)
Criminal Procedure Code, ss. 5, 51, 51A(1)(b), (1)(c), 112, 307(1), 418A
Dangerous Drugs Act 1952, ss. 12(2), 39A
Penal Code, ss. 377B, 467, 471

Criminal Code [Sing], ss. 5, 57
The Code of Criminal Procedure 1973 [Ind], s. 91

**Other source(s) referred to:**
Sohoni's *Code of Criminal Procedure*, 1973, 19th edn, vol 1, p 388

*For the pp - Dato' Mohd Yusof Hj Zainal Abiden (Dato' Nordin Hassan, Mohamad Hanafiah Zakaria, Wong Chiang Kiat & Shamsul Sulaiman DPP's with him); AG's Chambers*
*For the respondent - Karpal Singh (Dato' CV Prabakaran, Sivarasa Rasiah, Leela Jesuthasan, Sankara Nair, Edmund Bon, Amer Hamzah Arshad, Wan Anuar Shadat, Joanne Leong, Latheefa Koya, Mohd Razlan Jallaludin & Ram Karpal with him); M/s SN Nair & Partners*

*[Appeal from High Court, Kuala Lumpur; Criminal Application No: MT3-44-99-2009]*

*Reported by Andrew Christopher Simon*

## JUDGMENT

### Hasan Lah JCA:

### Introduction

**[1]** This is an appeal by the public prosecutor against the whole order of the learned High Court judge ("the learned judge") on 16 July 2009, allowing in most part, the respondent's application under s. 51 of the Criminal Procedure Code ("the Code") to compel the production of documents, materials, property and items as particularised in the respondent's notice of motion dated 10 June 2009 (encl. 2). The public prosecutor's appeal is registered as Criminal Appeal No. W-09-71-2009.

**[2]** The respondent had also filed an appeal against part of the same order, by which the learned judge did not allow the respondent's application for CCTV recordings at other locations within the Desa Damansara Condominium, the original samples and the s. 112 statement of other witnesses not named by the respondent. The respondent's appeal is registered as Criminal Appeal No. W-09-74-2009.

**[3]** On 6 November 2009 we allowed the appeal by the public prosecutor in part and dismissed the respondent's appeal. We now give the grounds of our decision.

## Background Facts

**[4]** The respondent was charged in the Sessions Court on 7 August 2008 under s. 377B of the Penal Code. He pleaded not guilty. On 5 March 2009 his case was transferred to the High Court on a certificate under s. 418A of the Code signed by the public prosecutor.

**[5]** After he was charged in the Sessions Court the respondent had, through his solicitors, made numerous requests to the public prosecutor for documents and materials.

**[6]** Dissatisfied with the response and the refusal by the public prosecutor to provide the documents and materials requested, the respondent filed an application by way of notice of motion dated 10 June 2009 for an order to compel the public prosecutor and/or other persons having custody, care and/or control, to produce to the respondent the following documents, property, materials and items:

(a) The original CCTV recordings allegedly taken from the guardhouse and lifts to Block 11 of Desa Damansara Condominium and any other locations within the condominium fitted with CCTVs.

(b) DNA samples - the original samples, original swabs, slides made during testing, pictures of the slides and the "Electro Pherogram" for each sample identified as "B-B12", "A-A7", "D1-D3".

(c) The notes of the chemists who did the testing and analysis.

(d) The notes from all the doctors who examined the complainant Mohd Saiful Bukhari bin Azlan at Hospital Kuala Lumpur.

(e) The doctors' notes, photographs and report of the Proctoscopy or other tests done on Saiful at Hospital Kuala Lumpur.

(f) The report from Hospital Pusrawi and doctor's notes on the examination done on Saiful.

(g) The video recording of statement by Saiful on 30 June 2008.

(h) Witness statements under s. 112 of the Code.

(i) Copies of all documents and items which will be produced by the public prosecutor under s. 51A(1)(b) of the Code.

(j) A statement of facts favouring the respondent under s. 51A(1)(c) of the Code.

(k) All documents and items that will not be used by the prosecution in the trial.

(l) A list of the prosecution witnesses.

(m) Alternatively, the respondent prayed for an order that the public prosecutor disclose, and that the respondent be allowed to inspect, all the documents and items mentioned above.

**[7]** Since the application was filed the prosecution had provided the respondent with the following documents and material:

(a) A CD with a copy of the alleged CCTV recording only for 26 June 2008;

(b) Copies of the "Electro Pherogram" of the alleged DNA samples tested;

(c) Notes of the doctor (as opposed to a report) from Pusrawi Hospital,

(d) A clearer copy of the respondent's statement.

**Preliminary Objection**

**[8]** At the outset of the hearing of this appeal Mr. Karpal Singh, learned counsel for the respondent, raised a preliminary objection. It was his contention that the appeal by the public prosecutor (and by the respondent) was incompetent on the ground that the order given

A by the learned judge was not appealable. This court had no jurisdiction to hear the appeal. According to Mr. Karpal the order of the learned judge was not a "decision" within the meaning of s. 50(1) of the Courts of Judicature Act 1964 read with the definition of "decision" in s. 3 of the same Act since the order did
B not finally dispose of the rights of the parties.

**[9]** In support of his contention Mr. Karpal cited the following cases:

C (a) *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 CA.

(b) *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 CA.

(c) *PP v. Letchumanan Suppiah* [2009] 5 CLJ 652 FC.

D **[10]** Under s. 3 of the Courts of Judicature Act 1964 the word "decision" is defined that "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. In *Saad Abas* case the Court of Appeal held that the decision of the High Court in ordering the applicants
E to enter their defence was a ruling that did not have the effect of finally disposing of their rights. In *Dato' Seri Anwar bin Ibrahim* case the Court of Appeal held that it had no jurisdiction to entertain an appeal on the subject of bail.

F **[11]** In *Letchumanan Suppiah* case the Court of Appeal ordered the respondent to enter his defence on a reduced charge of possession of drugs under s. 12(2), punishable under s. 39A of the Dangerous Drugs Act 1952. The public prosecutor appealed to the Federal Court against the decision and the respondent filed a cross-appeal
G against the decision in calling for his defence on the reduced charge of possession. The prosecution raised a preliminary objection against the cross-appeal by the respondent on the ground that he had no right of appeal as the decision of the Court of Appeal had not finally disposed of his rights yet. Similarly the respondent raised
H objection against the public prosecutor's appeal. Learned counsel for the respondent conceded that the respondent's appeal was not appealable because the matter had not finally disposed of the rights of the respondent. With regard to the public prosecutor's appeal the Federal Court held that the public prosecutor could appeal against
I the decision as the effect of the Court of Appeal's order was that the charge of trafficking had been finally disposed of by calling for the defence only for possession.

**[12]** In response the learned solicitor general, Dato' Yusof Zainal Abidin, submitted that the order of the learned judge had finally disposed of the public prosecutor's right with regard to the documents and the materials in dispute. That order determined the public prosecutor's right to refuse production of the documents and the materials to the defence.

**[13]** In *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260, one of the issues for determination by the Supreme Court was whether an appeal would lie to the High Court from an order made by a Subordinate Court under s. 51 of the Code. The Supreme Court held that a decision or order to issue a summons under s. 51 of the Code was a final order in the sense that it was final in its effect and therefore appealable under s. 307(i) of the Code.

**[14]** With respect, we agree with the submission of the learned solicitor general. The effect of the High Court's order was that the issue of the production of the documents and materials by the public prosecutor pursuant to s. 51 of the Code had been finally disposed of whereby the public prosecutor was ordered to supply the documents or materials to the respondent. The decision of the High Court had finally disposed of the respondent's notice of motion. As such this would be the correct time for the public prosecutor to appeal against the High Court's decision.

**[15]** For the reasons given above we dismissed the respondent's preliminary objection.

## The Basis Of The Respondent's Application

**[16]** The respondent made the application under ss. 5, 51 and 51A of the Code. According to the respondent the documents and materials requested for are important and imperative for the preparation of his defence. Without those documents and materials his defence would be handicapped. He had stated the main points of his defence at the first available opportunity, namely, alibi, credibility of the complainant, political conspiracy and tampering of evidence.

**[17]** Discovery provisions are found in s. 5, 51 and 51A of the Code. With the passing of s. 51A of the Code the respondent contended that there was now a new philosophy with regards to the disclosure and discovery procedure in criminal proceedings in

A Malaysia. This philosophy underscored the approach the court must take not only in the interpretation of s. 51A but also ss. 51 and 5 of the Code.

**[18]** According to learned counsel for the respondent the
B respondent only needed to show that the documents or materials applied for fulfilled any one of those three provisions.

**[19]** The public prosecutor's grounds of appeal as set out in their Petition of Appeal can be summarized as follows:

C (a) That the learned judge erred in law and fact in ordering the public prosecutor to produce the documents and materials to the respondent and/or allowing the respondent to view them;

(b) That the learned judge erred in law in failing to appreciate the
D true object of ss. 51 of the Code and misinterpreted the section;

(c) That the learned judge erred in law in reading conjunctively s. 51 and s. 51A of the Code when deciding that the public prosecutor had to disclose all evidence which would be used
E against the respondent, before trial;

(d) That the learned judge erred in law in considering the Hansard when s. 51A of the Code is clear and unambiguous and misconstrued the Minister's speech.

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(e) That the learned judge erred in law in ordering disclosure of documents when:

(i) the court has no such jurisdiction;

G (ii) the documents and exhibits requested by the respondent are not what is provided for in s. 51 and s. 51A of the Code.

**[20]** The respondent's grounds of appeal as set out in his Petition of Appeal are briefly as follows:

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(a) That the learned judge erred in not ordering production of the original samples and swabs as applied for;

(b) That the learned judge erred in fact and in law in holding that the identity and the chain of evidence would be affected if
I production of the samples were allowed before being tendered as evidence in court;

(c) That the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs;

(d) That the learned judge erred in not recognising the lacuna in the law and failing to apply s. 5 of the Code and the UK law on disclosure in criminal trial;

(e) That the learned judge erred in not ordering the production of the CCTV's in other locations;

(f) That the learned judge erred in not ordering the disclosure of the s. 112 witness statement of other witnesses not named by the respondent;

(g) That the learned judge erred in not allowing the inspection and discovery of the original samples, CCTV recordings at the other unnamed locations and witness statements of other unnamed witnesses;

(h) That the learned judge erred in holding that the court had to accept the s. 51A(1)(c) certificate issued by the public prosecutor without question.

## Section 5

**[21]** Section 5 of the Code provides:

> As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

**[22]** Learned counsel for the respondent submitted that despite the inclusion of s. 51A in the Code there is still a lacuna as to the disclosure and inspection process in criminal trials in Malaysia. It was contended that s. 51A is ambiguous in that it is not as comprehensive as the English provisions on disclosure and many matters are unclear and open to debate as this case itself demonstrated. As such s. 5 of the Code is applicable.

**[23]** In response to that the learned solicitor general submitted that s. 5 is not applicable as there is no lacuna in law relating to the disclosure and inspection process in criminal trials in Malaysia. Section 51 and 51A of the Code are clear and unambiguous.

**[24]** It is to be noted that the learned judge did not rely on s. 5 of the Code or resort to the English law in making the order. As such it must be assumed the learned judge had rejected the contention by the respondent that s. 5 was applicable to his application.

**[25]** The cases cited by learned counsel for the respondent to show that the Malaysian court applied s. 5 in criminal procedure are not concerned with the application under s. 51(and 51A) of the Code. They are concerned with other matters. As such those cases, in our view, are of no assistance to the respondent in this application.

**[26]** In *Kulwant v. Public Prosecutor* [1986] 2 MLJ 10 the applicant made an application to the High Court under s. 57 of the Singapore Criminal Procedure Code (which is in *pari materia* with our s. 51) for a certified copy of his earlier statement to the police. It was submitted in that case that s. 5 of the Singapore Criminal Code which makes English law relating to criminal procedure applicable in matters for which no special provision has been made by the Singapore Code was applicable to the applicant's case. P. Coomaraswamy J ruled that there was no lacunae in the Singapore Code making it necessary to resort to English law.

**[27]** The most authoritative decision on s. 51 of the Code is the decision of the Supreme Court in *Raymond Chia* case. In that case the Supreme Court did not resort to s. 5 of the Code in its judgment. In the other cases cited by the parties before us s. 5 was not considered by the Malaysian Court in its judgment. This could only mean that s. 5 is not applicable for the purpose of the application under s. 51 of the Code. Similarly in the instant case we were of the view that s. 5 of the Code was not applicable to the respondent's application as there was no lacunae in the Code on this issue making it necessary for us to resort to the English law.

**Section 51**

**[28]** For convenience s. 51 of the Code is reproduced, which reads as follows:

> 51. (1) Whenever any court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that court or officer, such court may issue a summons or such officer

a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

**[29]** As can be seen from that section the court is given wide powers to order the production of documents and property necessary and desirable for the purposes of trial. Applications under s. 51 can be made at any stage of the proceedings. The authorities have divided those applications into two categories, namely, (i) the pre-trial and (ii) in the course of the trial or proceedings. The authorities have also decided that for each category of application different considerations must be given by court in deciding whether to order the production of documents or materials. In the instant case the learned judge made the order under this section.

**[30]** As stated earlier the most authoritative case on s. 51 is the *Raymond Chia* case. In that case the two respondents were charged in the Sessions Court with three others for the offence of forgery under ss. 467 and 471 of the Penal Code. In the charge they were alleged to have used dishonestly a letter of credit for the amount of $2.4 million with certain named documents. The two respondents applied for various documents in the possession of the prosecution including the five documents mentioned in the charge for their inspection. The learned President of the Sessions Court made an order in favour of the respondents confined to the inspection of; (1) documents specifically referred to in the charge and (2) documents removed by the prosecution from the respondents. On appeal the High Court set aside the order of the learned President and the learned High Court judge, in exercise of his revisionary power, ordered that photostat copies of the five documents referred to in the charge be furnished to the respondents.

**[31]** The Supreme Court held that the order of the High Court for production of the documents was not a proper exercise of its revisionary powers. At pp. 439 to 440 of the report Hashim Yeop A. Sani SCJ (as he then was) said:

> We were urged that the vital factor in this reference is the distinction drawn between what is labelled as the "strict" approach taken by Seah J. (as he then was) in Syed Abu Bakar bin Ahmad (4) and the apparent "liberal" approach envisaged in Mallal's *Criminal Procedure* where the author said that "anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions" which approach would (it was urged) seem to have found favour with Hepworth J. in *Public Prosecutor v. Teoh Choon Teck* (5) and Wan Yahya J. in *Haji Abdul Ghani v. Public Prosecutor*.(6) We are of the view however that for practical purposes there is really no such distinction. From the language of the section ("necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding") it is quite plain that an application under that section may be made before the commencement of a trial or in the course of a trial. In exercising its discretion under section 51(i) of the Criminal Procedure Code the Court has to consider the justice of the case and at what stage of the proceeding the application is made.
>
> Where the Court is asked to exercise its discretion under section 51 of the Criminal Procedure Code before the commencement of trial the Court must have regard to the provisions of sections 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v. Teoh Choon Teck* [1962] 1 LNS 141 where he said:
>
> > If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification, however, is also stated by the learned Judge in the same page with which we respectfully agree:

> It will be observed that nowhere do sections 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

Where the application under section 51(i) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what Mallal's Criminal Procedure meant by saying that "anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions."

If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under section 51 of the Criminal Procedure Code. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. A general demand for unspecified documents should likewise not be entertained. See *Anthony Gomez v. Ketua Polis Daerah, Kuantan* (7) and *Khoo Siew Bee & Anor v. Ketua Polis Kuala Lumpur* (8) for another basis for the inspection and supply of the first information report and cautioned statement. Under section 51 of the Criminal Procedure Code the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to all documents whatsoever taken by the police during investigation. In respect of application made in the course of the trial the materials or documents asked for must be relevant to the issues for adjudication.

**[32]** In *Kulwant*'s case the application was made before the commencement of the trial. P Coomaraswamy J in his judgment considered and analysed the decision of the Supreme Court in *Raymond Chia* case. At p. 16 of Kulwant case he said:

> In discussing the questions posed to the Supreme Court, regard must be had to the nature of the documents requested by the accused in that case. The charge was one of forgery and the charge specifically mentioned five documents. The Supreme Court said that attention must be paid to sections 152, 153 and 154 of the

West Malaysian CPC (sections 157, 158 and 159 in Singapore) relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused.

In this context, the Supreme Court did say that an application under section 51 can be made before the commencement of the trial but this view was qualified as appears hereafter. From the whole judgment, it is clear that an application before commencement of trial is only for the purpose of giving adequate particularity to the charge where the charge itself specifies documents.

To quote the Supreme Court, "Where the application under section 51(i) of the CPC is made in the course of the trial, the rule of relevancy must be strictly enforced" at page 439/E. The Supreme Court went on to say:

> If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under section 51 of the Criminal Procedure Code.

The Supreme Court of Malaysia was dealing with two categories of documents. One is documents referred to the charge. The second is other documents. In respect of the latter, both the Malaysian and the Indian Supreme Courts expressed the same view in different terms. The Malaysian Court said that if a court is asked to exercise discretion "before commencement of trial the court cannot anticipate how the prosecution will proceed." The Indian Supreme Court quoted with approval the words of the magistrate. These words have already been quoted above. The views of these two Supreme Courts are my reasons and basis for saying that except in the case of documents referred to in the charge, an application under section 57(1) should be made only after the commencement of the recording of prosecution evidence.

**[33]** The *Raymond Chia* case and *Kulwant* case dealt with the application before the commencement of trial, which is similar to the instant case. Having carefully read and reread the decision in the *Raymond Chia* case we agree with P Coomaraswamy J's observation that except in the case of documents referred to in the charge an application under s. 51 should be made only after the commencement of the trial.

**[34]** It must be noted that the Supreme Court in *Raymond Chia* case had considered the judgments of the High Court in *Syed Abu Bakar Ahmad v. PP* [1981] 1 LNS 127, *PP v. Teoh Choon Teck* [1962] 1 LNS 141 and *Hj Abdul Ghani & Ishak v. PP* [1979] 1 LNS 23. These three cases also concerned with the application under s. 51 at the pre-trial stage. In *Teoh Choon Teck* case the accused was charged with forgery of a letter and a cheque. Hepworth J ordered the production of the letter and the cheque requested by the defence as these documents were specifically referred to in the charges and as it was essential for the accused to have the originals or photostat copies in order for him to properly prepare his defence.

**[35]** In *Haji Abdul Ghani* case the accused was charged with the offence of corrupt practices. Wan Yahya J held that the accused was entitled to be supplied with copies of statements made by him as the accused had a tangible interest in them. The learned High Court judge also held that the accused was entitled to inspect the documents seized by B.S.N. in connection with the trial.

**[36]** In *Syed Abu Bakar* case the accused applied for an order to inspect and make copies of all documents in the possession of the prosecution. The accused contended that without a reasonable opportunity of studying these documentary materials he would not be able to prepare his defence adequately or give full and accurate instructions to his counsel in the conduct of his defence. Seah J dismissed the application. He was of the view that s. 51 of the Code should be construed strictly. According to the learned High Court judge, s. 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation or in their possession before the criminal trial because to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial.

**[37]** In *Husdi v. PP* [1980] 1 LNS 29 the Federal Court held that where the defence seeks to impeach the credit of a prosecution witness the defence can be supplied with a copy of the witness's statement to the police. In the High Court (*Husdi v. PP* [1979] 1 LNS 33) Syed Othman FJ dismissed the application and held:

> But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

A For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements.

The Federal Court agreed with that where in his judgment Suffian LP said:

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Our conclusion is not inconsistent with judgment of Syed Othman F.J. in *Husdi v. Public Prosecutor* (2) out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police C statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

**[38]** In *State of Orissa v. Debendra Nath Padhi* [2004] 4 LRI 860 the Supreme Court of India made the following observation on s. 91 of The Code of Criminal Procedure 1973 of India (which is similar to D our s. 51) in para. 25 of its judgment:

(25) Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is [*13] 'necessary or desirable for the purpose of E investigation, inquiry, trial or other proceedings under the Code. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the F accused, the question of invoking s. 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage.

In para. 28 of its judgment the court said:

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(28) We are of the view that jurisdiction under s. 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the court in the context of the purpose - investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does H not permit a roving or fishing inquiry.

**[39]** In Sohoni's *Code of Criminal Procedure*, 1973, 19th edn, vol. 1, p. 388 it is stated that if the object of the inspection is merely to fish out for information, it is not a thing that could be permitted.

I **[40]** As can be seen from the authorities mentioned above the exercise of this discretionary power by the court under s. 51 of the Code with regard to the application at the pre-trial stage has been

limited. The courts construed the section strictly. Except as what is provided for under s. 51A of the Code the respondent is not entitled to discover or inspect evidence or material in the possession of the prosecution before the commencement of the trial. Based on the past decisions of the apex court we were of the view that the respondent was not entitled to get the order he prayed for in his notice of motion.

## Section 51A

**[41]** Section 51A of the Code came into force on 6 March 2006. It provides for automatic discovery of certain documents by the accused before the commencement of the trial. Section 51A(1)(b) provides for the delivery to the accused of a copy of any document which would be tendered as part of the evidence for the prosecution. Section 51A(1)(c) requires the public prosecutor to deliver to the accused a written statement of facts favourable to the defence of the accused.

**[42]** We agree with the submission of the learned Solicitor General that the wording of s. 51A is very clear in that what the prosecution is required to supply are those documents/statements of fact expressly stipulated therein.

## Whether Cases Relating To Disclosure Of Information, Documents And Materials Under Section 51 Are Still Relevant With The Coming Into Force Of Section 51A

**[43]** It is clear from the judgment of the learned judge that he disregarded the past authorities on disclosure of documents and information even though he had carefully considered those cases in his judgment. His reason for doing so can be found at p. 101 and 102 of the Appeal Record where the learned judge said:

> Meneliti peruntukan seksyen 51A, dibaca bersama seksyen 51, saya berpendapat tujuan di sebalik dimasukkan seksyen 51A walaupun ketika itu telah wujud seksyen 51 adalah untuk memastikan proses pendakwaan lebih terbuka dan adil berbanding dengan sebelum adanya seksyen 51A. Dengan ada Seksyen 51A ini telah mengubah proses pendakwaan sesuatu kes jenayah kepada lebih terbuka dan lebih adil mengikut keadaan sesuatu kes.

**[44]** In *Retnarasa Annarasa v. PP* [2008] 4 CLJ 90, the applicant, in the course of the inquest proceeding, made an oral application to the magistrate who was holding the inquest for post-mortem reports

and other medical reports to be supplied. The magistrate refused and instead ordered that the reports be given to the applicant after the relevant medical witnesses had given evidence. The applicant filed a notice of motion to set aside the magistrate's order; and to be supplied with the relevant reports. Counsel subsequently narrowed his application for disclosure to the post-mortem report on the applicant's deceased wife.

**[45]** The High Court in that case varied the order of the magistrate and ordered the supply of the post-mortem report to the applicant forthwith. In his judgment the High Court judge said at p. 93:

> [11] With the coming into force the provisions in the new s. 51A of the Criminal Procedure Code, cases relating to disclosure of information and documents, which were decided before this, ie, before the implementation of the said pre-trial discovery provisions, such as *Mohamed bin Musa v. Deputy Public Prosecutor* [1972] 1 MLJ 49 and *PP v. Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v. Public Prosecutor* [1985] 2 MLJ 436 will no longer be relevant.

**[46]** It is obvious from the judgment of the learned judge in the instant case that he was in agreement with the decision of the High Court in *Retnarasa* case. The learned judge disregarded the decisions of the apex court on the interpretation of s. 51 of the Code. In fact this was the main complaint by the public prosecutor.

**[47]** With due respect, we were unable to agree with the decision of the learned judge. In our view the decision of the apex court in *Raymond Chia* case and Husdi case are relevant and applicable in respect of the application for documents not specifically mentioned in s. 51A of the Code. In this connection we agree with the submission of the learned Solicitor-General that the law on the application of s. 51 had not changed notwithstanding the inclusion of the new s. 51A of the Code.

**[48]** The purpose intended by the Parliament in enacting s. 51A as reflected in the *Hansard* and the Minister's speech when tabling the bill must be read in the context of s. 51A only and could not be extended to s. 51 as s. 51 was already in existence. Section 51A provided for automatic disclosure. It has nothing to do with the court's discretion under s. 51. In our view the court therefore cannot read the parliament's purpose of introducing s. 51A into

s. 51 and the court cannot indirectly rely on the reasons given for the inclusion of s. 51A to interpret s. 51. Section 51 and 51A are two separate and distinct provisions as clearly spelt out from the wordings of the respective provision.

**[49]** For the reasons given above we are of the view that the learned judge erred in law in not observing the judicial precedents with regard to the interpretation of s. 51 of the Code in exercising his discretion. The High Court, like the Court of Appeal, is bound by all judgments of the apex court and it must apply the law as stated therein.

**[50]** At this stage it is necessary to take a close look at the documents and the materials applied for by the respondent in his notice of motion and the order and reasons given by the learned judge in his decision in respect of the documents and the materials.

*Para 1.1 - Original CCTV*

**[51]** The learned judge ordered the public prosecutor to supply copies of the CCTV recording at Desa Damansara Condominium, Jalan Setia Kasih, Bukit Damansara from "00 hours" until "24 hours" starting from 25 June to 27 June 2008, alleged to have been taken by CCTV at the following locations:

(a) the guardhouse of the Condominium;

(b) lift C at Block 11 of the Condominium; and

(c) passenger lift at Block 11 of the said Condominium.

**[52]** The learned judge stated in his judgment that since the public prosecutor had given a CD with a copy of the CCTV recording on 26 June 2008 there was no reason for the respondent not to be supplied with the recordings made on 25 and 27 June 2008. In making this order the learned judge took into consideration the fact that the defence from the beginning had disclosed its defence of political conspiracy. According to the learned judge these materials are important to the respondent for the preparation of his defence.

**[53]** Learned counsel for the respondent on the other hand submitted that the learned judge erred in not ordering the production of the CCTV in other locations or in not allowing the inspection and discovery of the original CCTV recordings at the other unnamed locations.

**[54]** Based on the decision of the Supreme Court in *Raymond Chia* case we were of the view that the order granted by the learned judge in respect of the CCTVs before the commencement of the trial was outside the scope of s. 51 of the Code. As such the order of the learned judge for the public prosecutor to produce the CCTVs was not a proper exercise of his discretionary powers. As stated in Sohoni's *Code of Criminal Procedure*, 1973, 19th edn. p. 388 if the object of the inspection is merely to fish out for information, it is not a thing that could be permitted. With due respect to learned counsel for the respondent we were of the view that the object of the respondent's application for CCTV recordings allegedly taken from the guardhouse and lifts to Block 11 of Desa Damansara Condominium and any other locations within the condominium fitted with CCTVs from 25 June to 27 June 2008 was merely to fish out for information. The respondent was therefore not entitled to obtain the original CCTV recordings before the commencement of trial. In the circumstances the order of the learned judge in allowing the respondent's application in respect of the original CCTV recordings was set aside and the cross-appeal by the respondent was dismissed.

*Para 1.2 - DNA Samples*

**[55]** The learned judge did not allow the respondent's application for the production or inspection of the original samples and swabs as applied for under para. 1.2(i) and (ii) of the notice of motion on the ground that since the samples were packed and sealed the identity and the chain of the evidence would be affected if production of the samples were allowed before they were tendered as evidence in court. The learned judge said that the defence may apply for the inspection of the samples after they were tendered as evidence in court.

**[56]** With regard to the slides during testing and the pictures of slides stated in para. 1.2(iii) and (iv) of the notice of motion the learned judge ordered the respondent's counsel be allowed to inspect them and the learned judge ordered that the pictures of those slides be supplied to the defence.

**[57]** Learned counsel for the respondent submitted that the learned judge erred in fact and in law in not allowing the application for the production of the original samples and swabs:

(a) when it would prejudice the respondent's right to a fair trial;

(b) when s. 51A(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering at trial;

(c) when he failed to take into account that the authenticity of the samples were doubtful and questionable because of tampering by the police.

**[58]** It was our view that the decision of the learned judge in respect of the original samples and swabs was correct in law as the respondent was not entitled at the pre-trial stage to have the original samples and swabs. With respect to the learned judge's order relating to the slides and pictures we were of the view that the learned judge erred in law in making the order. (See *Raymond Chia* case). Furthermore the respondent, in our view, should not be allowed to fish out for information. (Sohoni's *Code of Criminal Procedure*, 1973).

**[59]** With regard to the respondent's contention that s. 51A(1)(b) of the Code requires the public prosecutor to disclose to the accused all evidence they would be tendering our answer to that is that s. 51A refers to documents only.

**[60]** We therefore set aside the order made by the learned judge in respect of the slides and pictures and affirmed his decision in respect of the original samples and swabs. The cross-appeal by the Respondent under this heading was dismissed.

*Para 1.3 - Worksheet/Case Notes Of The Chemists Who Conducted The DNA Testing And Analysis*

**[61]** The learned judge ordered the public prosecutor to supply the worksheet/case notes of the chemist made during the analysis and tests carried out in respect of the original samples and swabs to the respondent on the ground that it would speed up the trial of the case.

**[62]** With respect, the learned judge erred in making the order. The issue for determination was whether the learned judge had the jurisdiction to make such an order. The learned judge felt into error because he disregarded the decision of the apex court in *Raymond Chia* case. These documents also would not come under s. 51A(1)(b) of the Code for the simple reason that the prosecution would not be tendering them in court as their evidence. It must be noted that if the respondent requires those documents for the

purpose of cross-examining the chemists when they are giving evidence the application for the production of those documents can only be made after the commencement of the trial. The decision of the Supreme Court in *Raymond Chia* case is clear with regard to the application under s. 51 of the Code before the commencement of the trial. The order of the learned judge under this heading was therefore set aside.

*Para 1.4 Witness Statements Under Section 112 Of The Code*

**[63]** The learned judge allowed the respondent's application for witness statement in respect of the persons named under para. 1.4(a) to (f) but disallowed the respondent's application in respect of para. 1.4(g) namely, other witnesses who have given statements under s. 112. The learned judge said that since the prosecution had given a statement under s. 51A(1)(c) to the defence to say that there was no statement of facts favourable to the defence of the respondent the defence should be given the opportunity to find out whether what was said by the prosecution was true or not. This could only be done by the defence if the defence was given access to the witnesses' statements. The learned judge was also of the view that there was nothing to suggest that the prosecution would be prejudiced or the public interest would be compromised if the witnesses statements were given to the defence. Furthermore it would enable the respondent to know in advance the case against him.

**[64]** Learned counsel for the respondent submitted that the learned judge erred in not ordering the disclosure of the statement of other witnesses after he ruled that the respondent was entitled to statement of the witnesses under para. 1.4(a) to (f).

**[65]** In respect of the learned judge's order for the production of the witnesses' statements it was our decision that the learned judge had erred. As stated earlier and based on the decision in the *Raymond Chia* case the learned judge had no jurisdiction to make such order under s. 51 of the Code before the commencement of the trial. Furthermore as stated by the Syed Othman FJ in *Husdi* case the statements made to the police in the course of a police investigation is a privileged document. Further, as a matter of public policy it is undesirable for the prosecution to supply the defence with the police statements as this is a real danger of tampering with witnesses. The witness statement could only be

supplied to the defence in a situation stated by the Federal Court in *Husdi* case. Furthermore, we were of the view that what the defence was doing here was merely to fish out for information. A general demand for the witnesses' statements should not be entertained.

**[66]** With regard to the learned judge's observation that the defence be supplied with the witnesses' statements so that the defence could find out whether what was said by the prosecution pursuant to s. 51A(1)(c) was right or not we were of the view that the issue could only be determined by the court after the commencement of the trial and after the relevant witnesses have given evidence in court. The court could not anticipate how the prosecution would prove its case.

**[67]** For the reasons stated above we set aside the order of the learned judge under this heading and dismissed the cross-appeal by the respondent.

**Other Documents**

**[68]** In his decision the learned judge also ordered the prosecution to supply the witness list to the defence. We were also of the view the order was wrong based on the reason given above for the setting aside of the learned judge's order in respect of the witnesses' statements. The order was therefore set aside.

**[69]** The learned judge also in his judgment ordered the prosecution to supply the following documents:

(a) case/examination notes of the doctors at Hospital Kuala Lumpur who treated and examined Mohd Saiful Bukhari bin Azlan including on 28 June 2008 (para 1.8);

(b) photograph, case/examination notes of the doctors and report of the proctoscopy or other examinations conducted on Mohd Saiful Bukhari bin Azlan at Hospital Kuala Lumpur including 28 June 2008 (para 1.9);

(c) all the unused documents (para 1.12);

(d) examination notes and medical report on Mohd Saiful Bukhari bin Azlan from Hospital Pusrawi (para 1.11).

**[70]** It was our decision that the learned judge erred in law in ordering the production of the documents mentioned in para. (69) above based on the reasons given above. We therefore set aside the learned judge's order in respect of the documents under para. (69) above. For the avoidance of doubt our order was made without prejudice to the respondent's right to be supplied with documents under s. 51A(1)(b) of the Code.

**[71]** In his judgement also the learned judge ordered the Prosecution to supply the following:

(a) copies of all documents pursuant to s. 51A(1)(b) of the Code,

(b) statement of facts favourable to the defence of the respondent pursuant to s. 51A(1)(c) of the Code.

**[72]** It is clear that under s. 51A(1)(b) and (c) of the Code the respondent was entitled to those documents. As such the learned judge was right in making the order for the production of those documents. We therefore affirmed the learned judge's orders in respect of those documents. Since the statement under s. 51A(1)(c) of the Code had been supplied by the prosecution to the defence we were therefore of the view that this matter was no longer an issue before us.

**[73]** For the reasons given above we also dismissed the respondent's cross-appeal under paras. 2 and 3 of his Notice of Appeal dated 21 July 2009.

## Conclusion

**[74]** The appeal by the public prosecutor was therefore allowed in part and the cross-appeal by the respondent was dismissed.